IN THE

Supreme Court of the United States

October Term, 1942

No. 1048

UNITED STATES OF AMERICA,

Petitioner,

v.

FRANK LAUDANI

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF FRANK LAUDANI IN OPPOSITION

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Question Presented	2
Statute Involved	2
Argument	7
Conclusion	13

Cases Cited

Church of Holy Trinity v. United States, 143 U. S. 458	12
Linder v. United States, 268 U. S. 5, 17	12
Ex parte Webb, 225 U. S. 663, 689	12
United States v. Butler, 297 U. S. 1, 68	12
U. S. v. Charlick, D. C. E. D. Penna., 26 Fed. Supp. 203	13
United States v. Constantine, 296 U. S. 287, 296	12
U. S. v. Golder, et al., D. C. E. D. Penna., 11 Fed. Supp. 870	13
United States v. Katz, 271 U. S. 354, 362	12
United States v. Noveck, 271 U. S. 201, 204	12
United States v. Resnick, 299 U. S. 207, 209, 2[illegible]9	12

PAGE

Judicial Code, Section 240 (a) as amended by the Act of February 13, 1925 2

Section 1, Act of June 13, 1934 (c. 492, 48 Stat. 948; 40 U. S. C. 276 b) 2

S. Res. 74 and 196 (73rd Cong.) 7, 9

S. Res. 228 (73rd Cong., 2nd Sess.) 7

S. Report No. 1189 (75th Cong., 1st Sess.), pp. 4, 20 ..... 7, 9, 10, 12

Amendment X, United States Constitution 12

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Opinons Below

The majority (R. 367-374) and dissenting (R. 374-375) opinions in the Circuit Court of Appeals are not yet reported. The memorandum opinion of the District Court overruling respondents demurrer and motion to quash the indictments appears at (R. 37-42).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered March 16, 1943 (R. 376), and a petition for rehearing (R. 379-390) was denied April 20, 1943 (R. 395). The

petition for a writ of certiorari was filed May 27th, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

The Kick-back Act prohibits inducing any person employed on a public work financed by the United States, by force or threats, to give up any compensation to which he is entitled under his contract of employment. The question presented is whether this prohibition applies to Laudani, who was charged with acting solely in his own interest and not in behalf of his employer, and was not a party to the contract of employment of his alleged victims.

Statute Involved

Section 1 of the Act of June 13, 1934 (c. 492, 48 Stat. 948, 40 U. S. C. 276b), commonly called the Kick back Act, provides:

> "whoever shall induce any person employed in the construction prosecution, or completion of any public building, public work, or building or work financed in whole or in part by loans or grants from the United States, or in the repair thereof to give up any part of the compensation to which he is entitled under his contract of employment, by force, intimidation, threat of procuring dismissal from such employment, or by any other manner whatsoever, shall be fined not more than $5,000, or imprisoned not more than five years, or both.

Statement

Respondent and one Alfredo Rossi, together with several others, were charged in a series of indictments with violations of the Kick-back Act of June 13, 1934 (R. 20-

26). Except for differences in names of the defendants and allegations, as to the names of victims, dates of the violations, and sums of money exacted, the counts of the indictments were couched in identical language (R. 21). They alleged that between January 1, 1937 and May 15, 1938, there was under construction at Weehawken, New Jersey certain public works known as the Weehauken Plaza connection of the Lincoln Tunnel under the Hudson River from New York to New Jersey; that the work was being constructed under a contract between the Port of New York Authority and George M. Brewster & Son, Inc., the general contractor, and a subcontract between the Brewster Company and the Cape Ann Granite Company for the furnishing and setting of granite rubble facing and coping necessary in the construction of the Weehauken Plaza connection; that all of this public work was being financed in part by grants from the United States; that respondent was foreman for the Cape Ann Granite Company, with authority to employ and discharge stone cutters and masons, and knew that the rate of pay for such employees, as fixed and posted on the work, was a certain amount per hour and that these employees were entitled to receive the full posted rate of pay without deductions for any purpose; and that respondent and his co-defendants, by intimidation and threats of dismissal and by giving to understand that all persons employed on the work would be required to give the defendants parts of their true wages so long as they were so employed, induced certain named employees to surrender to them parts of the compensation to which the employees were entitled for work and labor on the public work (R. 21-26, 38-39).

The defendants filed a demurrer (R. 26-31) and motion to quash (R. 32-36) the indictments on the ground, inter alia, that it was not alleged that they were the employers of the victims, or that they were acting in behalf of the

employer in inducing the victims to give up part of the compensation to which they were entitled. The demurrer and motion to quash were overruled (R. 37-42). This objection was renewed at the opening of the trial (R. 44-47), at the close of the Government's case (R. 207-208), and the conclusion of all the evidence (R. 273, 279), and in a motion in arrest of judgment (R. 319-320) and was in each instance overruled (R. 47, 208, 275, 280, 320).

The Government elected to proceed on five of the indictments and, after a severance as to the defendants other than respondent and Rossi, these indictments were consolidated for trial (R. 47-49). At the close of the trial the Government consented to the dismissal as to respondent of all three counts of indictment numbered 100, and seventeen of the counts of the remaining four indictments (R. 276-279, 316-317).

Nine counts were submitted to the jury, and respondent was convicted on each of these (R. 316-317, 332). The defendant Rossi was acquitted on the counts submitted as to him (R. 316-317). Respondent was sentenced to nine months' imprisonment on each count, the sentences to run concurrently (R. 333).

The evidence in support of the allegations of the counts on which respondent was convicted may be summarized as follows:

In 1926 the Port of New York Authority undertook to construct, as part of the Lincoln Tunnel project, certain installations at the New Jersey approach, and the United States, through the Public Works Administration, granted $4,780,000 to the authority to aid in financing these works (Ex. G. 5, R. 58; R. 75). Most of the cost of the enterprise was financed by the Authority. Contracts for portions of the works were let by the Authority to George M. Brewster & Son, Inc. (Ex. G. 6, R. 59; Ex. G. 7, R. 60), and the latter, in turn, sublet to the Cape Ann Granite

Company, Inc., contracts for furnishing and setting granite rubble facing and coping at the Weehauken, New Jersey, approach to the tunnel (Exs. G. 8, G. 9, R. 63). It is doubtful that any of the funds of the Public Works Administration were actually disbursed to the Cape Ann Granite Company, Inc. (R. 78, 81).

Laudani is married and has a family. He was well regarded in the community where he lived (R. 211, 212). He was not an officer, director or stockholder of the Cape Ann Granite Company (R. 234). He was employed as a foreman at $60 a week (R. 236) and was given authority to hire and discharge employees for and in behalf of that Company (R. 72). However, the officers of the Cape Ann Granite Company, together with its estimator were usually at the site of the work representing the Company (R. 328). The work commenced early in 1937 and ended May, 1938. The Cape Ann Granite Company were obliged to obtain union stone masons through three labor union Locals (R. p. 235, 236). Each Local had a business agent at the job to see to it that there was no infraction of union rules (R. 238, 239). One of them was Louis Mazzola, who was business agent of the Local to which Laudani belonged (R. 236). Although the Cape Ann Granite Company employed 100 workmen, there was no complaint by anyone until nine months after the work had been completed (R. 225, 244). During those nine months, Laudani had engaged in three heated election contests with Mazzola for offices in the Local (R. 245, 246, 248). The contests created bitterness between Mazzola, his followers and Laudani (R. 245, 246), and Mazzola swore revenge (R. 248).

The government's investigation commenced shortly after the last contest (R. 225-244). It was instigated and directed by Mazzola (R. 225, 229, 115, 252). The government's witnesses were adherents of Mazzola (R. 245, 249, 250). Only a few of the 100 workmen employed by the

Cape Ann Granite Company made charges. Only one of them (Tomasello) said Laudani asked him to rebate $.25 an hour (R. 134). The others said they conversed with Rossi or a fellow workman (not in the presence of Laudani), and thereafter paid to Rossi or the fellow workman, from 25 to 35 cents of their wages for each hour of their employment (R. 84, 123, 124, 142, 151, 152, 154, 156). In a few instances, they left the money at the foreman's shanty with Laudani (R. 91, 93, 94, 125, 126, 138, 142). Laudani vigorously denied the charges (R. 234, 265). He claimed the small sums which the workmen paid him were repayments of loans which he had made (R. 241, 253, 255). Rossi also denied the charges and corroborated him (R. 213 to 233). There was no evidence of the use of force or threats. The government established that the Cape Ann Granite Company and its officers knew nothing of these alleged activities, and did not authorize them (R. 72, 73, 242). The Court below reversed the convictions and remanded the cause with directions to quash the indictment (R. 374), on the ground that the prohibitions of the Kick-back Act apply only to the employer and persons acting for and on his behalf, and not to strangers to the employment contract who are acting in their own behalf (R. 370).

Circuit Court Judge Biggs agreed "* * * that the crime prohibited by the statute is the impairment or derogation of the employee's contractual right to the wages he is bound to receive under the contract" (R. 374), and that it * * * "was not intended to apply to instances of extortion unconnected with the contract of employment" (R. 375). His dissent is bottomed on his belief that "the defendant was in privity to the contract by representation * * *" (R. 374), and "* * * was not a stranger in fact or in law to the contract of employment" (R. 375). The Court below unanimously held (R. 373, 374) that the trial court committed reversible error in permitting the Prosecutor

to argue to the jury in effect that Laudani to establish his innocence, should have produced as witnesses, the remainder of the 100 employees of the Cape Ann Granite Company whom he was not charged to have subjected to extortion, so that they might testify that he had not exacted anything from them (R. 283, 285). The government does not contend that this holding was error.

Argument

1. An examination into the history of the statute discloses beyond doubt, that Congress never intended that it should apply to a situation so wholly local in nature, as is presented by this record. The statute resulted from hearings before a sub-committee of the Senate Committee on Commerce, pursuant to S. Res. 74 and 196 (73rd Cong.) and it was draughted and recommended by that body.[1]

The Senate Committee on Education and Labor pursuant to S. Res. 228 (73rd Cong. 2nd Sess.) merely held preliminary hearings on May 4th and 7th 1934, to determine whether conditions were such as to warrant an investigation—"of the relationship existing between certain contractors and their employees in the United States."[2]

The legislation in question had passed the Senate and was pending in the House at the time the preliminary hearings were held.

At the preliminary hearings, many representatives of organized labor appeared and gave testimony. What they said may be briefly summarized as follows: Dishonest contractors and sub-contractors who had been awarded

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[1] S. Report No. 1189 (75th Cong. 1st Sess.), pp. 4, 20.

[2] Hearings before sub-committee of the S. Committee on Education and Labor, Part 1, pp. 1, 2.

[3] Id. p. 3.

contracts to perform Federal public construction work (in the District of Columbia), were not paying the prevailing rate of wages to their employees, as required by their contracts. Contractors had gone to other parts of the country where the wage scale was lower and had induced cheap labor, both union and non-union, to come to the District. These workmen were offering their services at rates far below the prevailing wage scale in the District. Dishonest contractors were taking unfair advantage of the situation by employing these workmen at low rates and using all sorts of subterfuges to cloak their illegal operations. Those complaining sought a curb of such activities.[4]

After the preliminary hearings were completed, the sub committee was authorized to proceed and it did not commence to hold its hearings until June 21st, 1934, which was after the "kick-back" statute was enacted.[5]

Much of the testimony before that sub-committee, referred to by the government in its petition (Pet., p. 9), was offered after the statute became a law.[6]

Furthermore, in the incidents referred to in the petition, the foremen were apparently acting in concert with their employers.[7]

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[4] Id. pp. 2 to 161

[5] Id. pp. 1, 2

[6] The testimony referred to on Id. pp. 341-342, 333, 428, was given on June 22, 1934. The statute became a law on June 13, 1934.

[7] On Id. p. 341:

"That your affiant receives the sum of $1.50 per hour for an 8-hour day, but that your affiant, after saying the pay roll for the $1.50 rate per hour, is required to return to the foreman 50 cents per hour, and which sum your affiant is informed is returned to the general contractor."

And Id. p. 333:

"It was a 'kick-back' case where the contractor required the employees, or at least their superintendent for the contractor required their employees to refund 50 percent of their wages. They paid their men with a check for the correct amount, and after they had left the reservation, the men returned that check and received a different check for just half of what they should rightfully receive."

The record of proceedings before that sub-committee do not express a purpose by Congress to extend the statute in the manner contended for by the government.

The report of the sub-committee of the committee on Commerce pursuant to S. Res. No. 74 and 196 (73rd Cong.) discloses that this statute was first discussed on December 21, 1933 after George J. Atwell, President of the George J. Atwell Foundation Corp. had complained to the committee and had appeared and testified before it.[8]

The committee was obviously impressed by his testimony, and the views he expressed and the suggestions which he offered, are reflected in the text of the statute.[9]

It was his view that the "kick-back" was the fault of the contractor who bid so low for Federal work that he could not do it at the price without receiving a "kick-back" from the workmen.[10]

That practice put the honest contractor to a serious disadvantage. It was Mr. Atwell's suggestion that the government rid itself of such dishonest contractors and the way to accomplish it was to compel contractors to pay the prevailing rate of wages and stop them from obtaining a "kick-back" from the workmen.[11]

He suggested that every payroll should be certified and sworn to by the contractors.[12]

That suggestion is clearly embodied in the statute.[13]

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[8] S. Report No. 1189 (75th Cong. 1st Sess.) page 4—hearings before sub-committee of the S. Committee on Commerce (73rd Cong. 2nd. Sess.) Vol. I, part 5, page 789.

[9] S. Report No. 1189 (75th Cong. 1st Sess.) p. 20.

[10] Hearings before sub-committee of the S. Committee on Commerce (73rd Cong. 2nd Sess.) Vol. I, Part 5, p. 792.

[11] Id. pp. 793, 796.

[12] Id. p. 793.

[13] S. Report No. 1189 (75th Cong. 1st Sess.) pp. 20, 40. See Sec. 2 of the Act. 40 U. S. C. 276C.

Most of the testimony before the committee related to incidents basically similar to that charged in the indictment under consideration.[14] The government in its petition has set forth some of them (Pet., p. 9).

But the committee regarded such incidents as of a purely local nature and "*not within the jurisdiction of the Federal Government.*"[15] (Italics supplied.)

It defined "kick-back" as—"the nefarious practice of requiring the employee to give back to his employer a percentage of his earnings."[16]

The report of Mr. Sumners of the Committee on Judiciary in the House, contains the following:

> "This bill is aimed at the suppression of the so-called "kick-back racket" by which a contractor on a Government project pays his laborers wages at the rate the Government requires him to pay, but thereafter forces them to give back to him a part of the wages they have received" (R. 360).

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[14] S. Report No. 1189 (75th Cong. 1st Sess.) pp. 20 Hearings before sub-committee of the S. Committee on Commerce (73rd Cong. 2nd Sess.) Vol. I, Part 5, pp. 790 to 826.

[15] The Committee reported (page 20):

"After a thorough study of the testimony given and the complaints made, the committee concluded that the *majority of the cases presented were of a local nature and were not within the jurisdiction of the Federal Government.* But it was decided that the committee could effectuate the purpose of certain Federal statutes concerning rates of wages to be paid on work done under Government contracts. To this end a bill (S. 3041) was introduced during the Seventy-third Congress entitled 'A bill to effectuate the purpose of certain statutes concerning rates of pay for labor, by making it unlawful to prevent anyone from receiving the compensation contracted for thereunder, and for other purposes.' This bill passed both Houses and became Public Act No. 324. In accordance with the power conferred by this act, the Secretary of the Treasury and the Secretary of the Interior jointly promulgated a series of regulations effective January 15, 1935, which were to be incorporated in every Federal Government contract. This regulation required the filing of an affidavit sworn to by the person in charge of the pay rolls, attesting the pay roll and that no rebates or deductions were made, directly or indirectly." (Italics supplied.)

[16] S. Report No. 1189 (75th Cong. 1st Sess.) page 18.

The report of Mr. Stephens of the Committee on judiciary in the Senate, contains the following:

> "It has been a common practice for contractors constructing Federal buildings to pay the employees the prevailing rate as determined by the Secretary of Labor and then have them return a certain amount to the contractor. That is a most vicious practice" (R. 359).

The Court below was therefore clearly correct in holding:

> "The legislative history of the Act leaves little doubt that it was intended to penalize contractors who, enjoying federal work or work federally aided, unconscionably enrich themselves at the expense of their employees in denial of their contracts of employment" (R. 370).

And in holding:

> "But nowhere in the Act, its title, or its legislative history is it suggested that it was intended thereby to reach an extortioner or blackmailer (not privy to the contract of employment) merely because the persons upon whom such an offender preys receive their compensation as employees of a contractor doing public work financed in whole or in part by federal aid" (R. 371).

Since it was the intention to reach all those who aided and abetted the contractor, there is nothing in the use of the phrase "by threat of procuring dismissal from such employment"—which manifests a purpose to extend its terms in the manner the government suggests. Anyone intending to aid an employer in inducing an employee to give up a part of his compensation, may use as a means, a threat to procure the dismissal of such employee from his employment.

2. The government's contention ignores all of the applicable settled rules which govern the construction of

criminal statutes. Since the statute is highly penal, the Court below properly construed it strictly in favor of the accused,[17] and resolved every ambiguity and uncertainty about its meaning, in favor of his liberty.[18] Those who draughted the statute recognized the constitutional demarcation between State and Federal authority.[19] The Court below properly avoided a construction which might create constitutional doubts.[20] It correctly limited and controlled the literal import of the broad terms and phrases employed, in order to secure the object, which the act intended to reach.[21] The construction contended for by the government is contrary to the views of the majority as well as the minority, of the Court below.[22] It is contrary to the construction afforded by the Comptroller General (R. 361).

In reaching his decision to quash an indictment in a prosecution brought against certain employers charged with conspiring to violate the act in question, Judge Kirkpatrick in 1935, construed the act identically as did the

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[17] *United States* v. *Resnick*, 299 U. S. 207, 209, 210.

[18] *Ex parte Webb*, 225 U. S. 663, 689; *United States* v. *Novcek*, 271 U. S. 201, 204.

[19] S. Report No. 1189 (75th Cong. 1st Sess.) p. 20, Amendment X, United States Constitution; *United States* v. *Constantine*, 296 U. S. 287, 296; *United States* v. *Butler*, 297 U. S. 1, 68.

[20] *Linder* v. *United States*, 268 U. S. 5, 17.

[21] *United States* v. *Katz*, 271 U. S. 354, 362. *Church of Holy Trinity* v. *United States*, 143 U. S. 458.

[22] Judge Biggs said:

"I agree with the majority that the 'contract of employment' referred to in the statute is the contract of employment between the employer and the employee and that the crime prohibited by the statute is the impairment or derogation of the employee's contractual right to the wages he is bound to receive under the contract." * * * R. 374.

"* * * From the very terms of the statute it is obvious as the majority cogently point out that the section was not intended to apply to instances of extortion unconnected with the contract of employment." R. 375.

Court below.[23] The government did not appeal that decision nor did it appeal a subsequent decision by the same judge wherein he reiterated that view.[24]

This appears to be the first prosecution ever directed against a person, who was not an employer, or who was not charged with aiding or acting in concert with an employer and that fact seems to negative the suggestion that a question of large public importance is involved.

Conclusion

The Court below correctly repelled this belated, initial attempt to extend the operation of the statute, into a sphere, which Congress never intended to invade.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

July 23, 1943.

HAROLD SIMANDL,
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[23] *U. S. v. Golder, et al.*, D. C. E. D. Penna. 11 Fed. Supp. 870.

[24] *U. S. v. Charlick*, D. C. E. D. Penna. 26 Fed. Supp. 203.